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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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Brief of Filofax Inc., *Amicus Curiae*, in Support of Respondent

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Charles H. Bayar, Esq.
Counsel of Record
P.O. Box 4527, Grand Central Station
New York, New York 10163
(212) 867-0025
Counsel for *Amicus Curiae* Filofax Inc.

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Brief of Filofax Inc., *Amicus Curiae*, in Support of Respondent

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Filofax Inc. ("Filofax") is the importer and U.S. distributor of the famous "Filofax" line of personal

[1] Pursuant to S. Ct. R. 37.6, *amicus curiae* states that counsel for the parties hereto did not author this brief in whole or in part, and that no person or entity other than *amicus curiae* and its counsel have made a monetary contribution towards its preparation or submission. Letters from the parties hereto consenting to the filing of this brief have been lodged with the Clerk.

organizers, created in England almost 80 years ago. Filofax organizers resemble respondent's "day planners" in that they feature engagement calendars,[2] telephone/address grids, plain note paper, and other items inserted into a loose-leaf binder. Pet. App. 19a. Filofax has three civil actions pending in the Court of International Trade, and numerous protests pending before the U.S. Customs Service ("Customs"), on the merits of the tariff classification issues raised herein with respect to Filofax organizers entered on and after November 26, 1995.[3]

In the course of its litigation against Customs in this matter, Filofax has developed certain insights into the merits of the issues, which may assist the Court in its deliberations. In particular, the British origin of Filofax organizers, which still influences their design, gives Filofax a unique insight into the meaning of the word "diary" that may prove decisive in the Court's consideration of the merits of this case.

SUMMARY OF ARGUMENT

1. Customs' determinations of the common meaning of tariff terminology are not entitled to deference from the courts. Unlike the statutory constructs, abstractions, and generalizations that characterize classic *Chevron* deference cases, and customs cases in which the courts have accorded *Chevron* deference to Customs' statutory interpretations, tariff terminology is intrinsically precise because it denominates tangible articles bought and sold in commerce. Absent a

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[2] For reasons explained herein, the engagement calendar section of a Filofax organizer is labeled a "Diary".

[3] Filofax's civil actions in the Court of International Trade involving the tariff classification of its organizers entered before November 24, 1995, were stipulated in Filofax's favor on procedural grounds.

demonstrated commercial meaning or an explicit statutory definition, a tariff term has only one possible meaning -- its common meaning at the time the tariff law was enacted. That common meaning is to be correctly ascertained -- not devised, or selected from a menu of possible interpretations, in the exercise of agency discretion implicitly delegated by Congress.

Petitioner asserts that the courts must defer to Customs' tariff classification decisions in their entirety if "reasonable" in light of the information before the agency. Affording such deference would turn tariff classification cases into reviews of Customs' protest decisions on the agency record. This result would violate 28 U.S.C. § 2640(a)(1), which requires that classification cases be tried in the Court of International Trade "on the basis of the record made before the court."

Petitioner's policy arguments in favor of deference to Customs classification rulings, based upon agency expertise and nationwide powers, do not apply in the context of tariff classification decisions. On the other hand, according deference to Customs rulings will discourage importers from seeking Customs' guidance, since they will know that they will be at a serious disadvantage in challenging Customs' treatment of their importations in court if they have received a pre-importation ruling on the issues.

2. Customs determination in HQ 955937 that respondent's day planners are "diaries" under HTSUS 4820.10.20 disregards the separate classification of articles "similar to diaries" and is unlawfully based upon the British usage of the word "diary." Customs relies upon its own precedent, *i.e.*, "this office has consistently determined that articles *similar* in design and/or function to [respondent's day planners] are classifiable as diaries" in HTSUS 4820.10.20 (emphasis added). Pet. App. 31a; Pet'r Br. at 35. If respondent's day planners are "*similar* in design and/or function" to articles previously classified as "diaries" in HTSUS 4810.10.20, then they are properly

classified in HTSUS 4820.10.40 as articles *similar* to diaries.

The crux of HQ 955937 is Customs' exclusive reliance upon the second definition of "diary" from the *Oxford English Dictionary*. Customs reads this definition to include a blank book for noting future appointments. Other *Oxford* dictionaries explicitly define "diary" to include a blank, dated book for noting future engagements, while *Webster's* and *American Heritage* dictionaries do not do so. The difference between these dictionaries can be resolved and explained, and the *Webster's/American Heritage* definition clearly is correct:

a). *Webster's New World College Dictionary* is the official authority in word usage for the two major U.S. wire services, a major national financial newspaper, and three of the pre-eminent major U.S. city newspapers. This circumstance alone favors *Webster's* over *Oxford* on general issues of common meaning.

b) The *Webster's* and *Oxford* definitions both reflect the common meaning of the word "diary" -- *Webster's*, in the United States, and *Oxford*, in Great Britain.

For the common meaning of tariff terms, Customs and the courts must look to American usage (See, e.g., *Two Hundred Chests of Tea*, 9 Wheat. 430, 438 (1824)), and so the *Webster's* definition of "diary" should apply under HTSUS 4820.10.20.

Customs knowingly violated this principle in HQ 955937 by selecting the *Oxford* definition. In HQ 953413, March 29, 1993, Customs explained that it selected the broader *Oxford* definition of "diary" because the narrower *Webster's* definition "would place a narrow construction on the interpretation of the nomenclature at the international level." Customs understands and applies the American usage principle, however, when articles other than day planners are involved. *See* HQ 954022, August 8, 1994, and HQ 952530, June 9, 1994., in which Customs adopted the American meaning of "T-shirt" to exclude long-sleeved shirts, even though, at the international level, a T-

shirt may be long-sleeved.

In sum, based upon the correct and lawful lexicographic authority, *Webster's*, respondent's day planners are the same as diaries in that they are blank books with dated pages, but they differ from diaries in that they are designed and used to note future appointments, events, and the like rather than to record present events. Accordingly, they are properly classified in HTSUS 4810.10.40. The court of appeals' decision to this effect is correct, and Customs' determination to the contrary in HQ 955937 is erroneous.

3. Customs' determination that diaries in loose-leaf ring binders are "bound" under HTSUS 4820.10.20 is an unlawful, "backwards" exercise in tariff classification, reflects an impermissible interpretation of the term "bound," is erroneous even under that interpretation, and is otherwise insupportable.

Customs' determination that diaries in loose-leaf ring binders are "bound" under HTSUS 4820.10.20 is supposed to be a conclusion reached by ascertaining the common and commercial meaning of "bound" in HTSUS 4820.10.20, then applying that meaning to the features and functions of a loose-leaf ring binder. *Hewlett-Packard Co. v. United States*, 189 F.3d 1346, 1348 (Fed. Cir. 1999), *citing Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). In HQ 955937, however, Customs ran the tariff classification process backwards -- first, concluding that loose-leaf ring binders make "bound" diaries under HTSUS 4820.10.20, then, "[l]astly," employing "a semantical approach to the issue" in order to synthesize a compatible definition of "bound," *i.e.*, "held together in a fixed order". Pet. App. 46a. As a matter of tariff classification procedure, this is unlawful.

Customs' other stated grounds for its determination are baseless. Customs framed the issue in terms of what is a "bound diary," and posited that "there is no requirement that a diary be in the format of a book". Pet. App. 44a, Pet'r. Br. 35-36. That

very requirement, however, is reflected in the *Oxford English Dictionary* definition of "diary" which Customs embraced in the decision. Moreover, respondent's day planners, even if they be "diaries," *are* in the format of a book, and so the determination whether they are "bound" cannot be divorced from that context.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN") to Heading 4820, p. 687, which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc." (Pet. App. 45a) do not definitively state, or even imply, that loose-leaf ring binders make "bound" books. The manifest purpose of this paragraph is make clear that stationary articles of paper or paperboard remain classified in Heading 4820 even if they incorporate other materials.

Customs asserts that there would be a classification anomaly under the pre-1989 tariff classification system if diaries in ring binders and with spiral binding are not deemed "bound." That is not so, but there would be such an anomaly under the current classification system if "bound" means merely "held together." Unbound diaries which do not have their pages held together must be classified in HTSUS 4820.10.40, but that classification treatment is precluded by HTSUS Ch. 48, Note 9. In order to enforce Note 9 without nullifying HTSUS 4820.10.40 vis-a-vis unbound diaries, the term "bound" cannot mean merely "held together."

Finally, Customs' "semantical approach to this issue," *viz.*, "a binder . . . is that which binds pages together in a fixed order. Pages held together in this manner are bound . . ." (Pet. App. 46a), actually undercuts Customs' determination. Inserting pages into a "binder" merely holds them together in a *changeable*, not fixed, order; "binding" pages to make a "bound" book entails fastening them together in a fixed order.

The former connotes a temporary or changeable condition; the latter connotes permanency. The pages of respondent's loose-leaf day planners are held together in a changeable order, not fastened together, or even held together, in a fixed order, and so they are not a "bound" book.

ARGUMENT

I. CUSTOMS' DETERMINATIONS OF THE COMMON MEANING OF TARIFF TERMINOLOGY ARE NOT ENTITLED TO DEFERENCE FROM THE COURTS

Filofax has only a few brief points to make on the First Question Presented: "Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper classification of imported goods?"

1. Petitioner argues that the court of appeals should have accorded *Chevron* deference[4] to a particular Customs "ruling," HQ 955937, Oct. 21, 1994, Pet. App. 28a-47a.[5] Petitioner

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[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[5] Petitioner repeatedly characterizes HQ 955937 as a "ruling," and bases its deference arguments largely on statutory and regulatory provisions pertaining to "binding rulings." Petitioner's Brief ("Pet'r Br.") at 19, 23, 27-33, *citing* 19 U.S.C. §§1502(a), 1625(c); 19 C.F.R. § 177.9(a). Binding rulings are issued by Customs Headquarters or, in some instances, individual customs ports, with respect to the customs treatment of prospective importations, based upon facts presented by the concerned importers. *See generally* 19 C.F.R. §§ 177.1-.9. HQ 955937, however, is a "protest review decision" (Pet. App. 28a), which Customs Headquarters issues after "further review" of an administrative protest filed by the importer concerning the customs treatment of its past importations. *See generally* 19 C.F.R. §§ 174.23-.27. To the extent that they are based upon the status and effect

occasionally mentions that *Chevron* deference applies to agencies' reasonable interpretations of "ambiguous terms" in the statutes which they administer. Pet'r Br. at 19-20, 27. Remarkably, however, petitioner does not claim, much less demonstrate, that the tariff terms which Customs interpreted in HQ 955937 -- "diary" and "bound" in HTSUS 4820.10.20 -- are ambiguous, nor did Customs so assert in HQ 955937.[6] Notwithstanding this omission, in order to decide whether petitioner is entitled to the result it seeks, this Court must determine for itself whether those tariff terms are ambiguous, utilizing the well-established rules of statutory construction.[7]

In HQ 955937, when challenged by respondent on its selection of a dictionary definition for "diary," Customs responded: "Reference to lexicographic sources is a means to *ascertain* the commonly accepted definition or definitions, for a word or term. . . . Many words have several definitions and Customs may consider any or all of them when making a classification determination." Pet. App. 33a (emphasis added).[8]

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of binding rulings, petitioner's arguments are inapposite to HQ 955937.

[6] Even if petitioner or Customs had so asserted, *Chevron* does not command the courts to defer to their opinion. Moreover, the mere fact that Customs and respondent disagreed about the meanings of the tariff terms at issue in HQ 955937 does not mean that they are ambiguous; otherwise, an agency could manufacture ambiguity by refusing to accept a clear meaning.

[7] *See Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

[8] "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992), *quoting Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir.), *cert. denied*, 488 U.S. 943 (1988).

Here, unwittingly, Customs explains why petitioner's claim for *Chevron* deference to Customs' interpretations of tariff terminology must fail.

Unlike the statutory constructs, abstractions, and generalizations that characterize classic *Chevron* deference cases,[9] and even customs cases in which the courts have accorded *Chevron* deference to Customs' statutory interpretations,[10] tariff terminology is intrinsically precise

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[9] *See Chevron* ("stationary source" of air pollution); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) ("the business of banking"; "insurance"); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (loan "interest"); *Udall v. Tallman*, 380 U.S. 1 (1965) ("disposition" of land; "public-land laws").

[10] *See United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) ("operations incidental to the assembly process" in HTSUS 9802.00.80); *National Customs Brokers & Forwarders Ass'n v. United States*, 59 F.3d 1219 (Fed. Cir. 1995)(*Chevron* deference to Customs rule on informal entry of goods); *Chrysler Motors Corp. v. United States*, 755 F. Supp. 388 (Ct. Int'l Trade 1990), *aff'd*, 945 F.2d 1187 (Fed. Cir. 1991) ("operations incidental to the assembly process" in HTSUS 9802.00.80); *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401 (Fed. Cir. 1989) ("United States pack" tuna, for purposes of the tariff rate quota for tuna classifiable in item 112.30, TSUS, does not include tuna packed in American Samoa); *Guess? Inc. v. United States*, 944 F.2d 855 (Fed. Cir. 1991) ("fungible" merchandise for duty drawback purposes); *Generra Sportswear Co. v. United States*, 905 F.2d 377 (Fed. Cir. 1990) ("price actually paid or payable" for imported merchandise under customs valuation law). *Cf. Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978)(pre-*Chevron* deference to Customs interpretation of "bounty or grant" under countervailing duty law);

In *DAL-Tile Corp. v. United States*, 829 F. Supp. 394 (Ct. Int'l Trade 1993), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994), the Court of International Trade noted *Chevron* deference, but found and enforced the plain meaning of the customs liquidation provisions. *Goodman Mfg., L.P. v. United States*, 69

because it denominates tangible articles bought and sold in commerce.[11] Absent a demonstrated commercial meaning or an explicit statutory definition, a tariff term has only one possible meaning -- its common meaning at the time the tariff law was enacted.[12] That common meaning, like the truth about *The X-Files*, "is out there" to be correctly *ascertained* -- it is not to be devised, or selected from a menu of possible interpretations, in the exercise of Customs' administrative discretion implicitly delegated by Congress.

2. *Chevron* deference is for an agency's interpretation of ambiguous terms in its administered statute -- not the agency's application of that interpretation to the facts of the matter. In tariff classification cases, "[w]hile the meaning of a classification term is a question of law, the issue of whether merchandise comes within the definition of a classification term is a question of fact . . . .". *Totes, Inc. v. United States*, 69 F.3d

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F.3d 505 (1995), involved Customs regulations on calculating allowance for recoverable waste, for purposes of valuation of manufactured goods entered from a foreign trade zone. The Federal Circuit acknowledged *Chevron* deference but held that Customs' interpretation was unlawful.).

[11] The courts denied *Chevron* deference to Customs' classification positions in *Rollerblade, Inc. v. United States*, 112 F.3d 481 (Fed. Cir. 1997) ("footwear" under TSUS 700.56, TSUS and HTSUS 6402.19.10); *IKO Industries v. United States*, 105 F.3d 624, 626 (Fed. Cir. 1997) ("articles of asphalt" under HTSUS 6807; "asphalted paper" under HTSUS Ch. 68, Note 1(b)); *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463 (Ct. Int'l Trade 1996) ("unwrought" metals and "manufactured primary forms" of metals under HTSUS Sec. XV, Add'l U.S. Note 2); *Semperit Indus. Prods., Inc. v. United States*, 855 F. Supp. 1292 (Ct. Int'l Trade 1994) ("predominate" textile components in rubber belts in HTSUS 4010.91.15).

[12] *See, e.g., Lynteq*, 976 F.2d at 697; *E.M. Chemicals v United States*, 920 F.2d 910, 913 (Fed. Cir. 1990). Customs employs the same rule of construction. *See, e.g.*, HQ 962328, Aug. 24, 1999; HQ 961974, June 15, 1999.

495, 498 (Fed. Cir. 1995); *E.M. Chemicals v. United States*, 920 F.2d 910 (Fed. Cir. 1990); *Simod America Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989).

Petitioner asserts that the courts must defer to Customs' tariff classification decisions in their entirety -- both conclusions of law and findings of fact -- if "reasonable" in light of the information before the agency.[13] Affording such deference would mean that tariff classification cases, which may be brought in the Court of International Trade only after Customs' denial of an administrative protest (*see* 19 U.S.C. § 1514(a)), would become reviews of Customs' protest decisions on the agency record. This result would violate 28 U.S.C. § 2640(a)(1), which requires that protest denial cases be tried in the Court of International Trade "on the basis of the record made before the court."

3. Petitioner advances several policy arguments in favor of deference to Customs classification rulings, which do not apply in that context. Deference to Customs classification rulings is not needed in order to ensure that the HTSUS is construed and applied consistently and correctly by a specialized, expert federal agency,[14] rather than piecemeal by general-purpose,

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[13] Pet'r Br. at 20-23, 31 ("the courts below should have deferred to these rulings and upheld them if they 'implement the congressional mandate in some reasonable manner'"), 34-36 ("The Customs Service reasonably interpreted the statutory classification of "bound" "diaries" to include the spiral and ring-bound day planners imported by respondent.").

[14] Customs undoubtedly is expert in navigating the headings and subheadings of the HTSUS, and has unique access to its body of precedential decisions, but it is not necessarily adept at ascertaining the common meaning of tariff terms -- HQ 955937 proves as much. Customs cannot claim any unique qualifications in researching and analyzing lexicographic authorities, nor can it specialize in omniscience about the myriad articles of commerce which it classifies. Customs does have a cadre of "National Commodity Specialists" based in New York, who directly issue numerous routine

regional federal courts. Pet'r Br. at 25-26 n.11. The Court of International Trade and the Court of Appeals for the Federal Circuit are courts of national venue and hear all customs cases. 28 U.S.C. §§ 1292(c)(1), 1295(a)(5), 1581-84.

On the other hand, according deference to Customs rulings will have serious detriments to both Customs and the importing community. Congress' manifest objective in providing for binding rulings in 19 U.S.C. § 1502(a) was to encourage importers to seek Customs' pre-importation guidance on classification and other customs issues; Customs itself encourages importers to seek prospective rulings under the rubric of "informed compliance." Affording deference to Customs rulings will discourage importers from seeking Customs' guidance, since they will know that they will be at a serious disadvantage in challenging Customs' treatment of their importations in court if they have received a pre-importation ruling on the issues.

II. CUSTOMS' DETERMINATION THAT RESPONDENT'S DAY PLANNERS ARE "DIARIES" UNDER HTSUS 4820.10.20 DISREGARDS THE SEPARATE CLASSIFICATION OF ARTICLES "SIMILAR TO DIARIES," IS UNLAWFULLY BASED UPON A BRITISH USAGE OF THE WORD "DIARY," AND IMPROPERLY RELIES UPON COURT PRECEDENT UNDER AN OBSOLETE TARIFF REGIME

1. The first rationale given by Customs in HQ 955937 for

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classification rulings and regularly advise Customs Headquarters personnel on classification matters. They are career Customs officers, however, with little or no hands-on experience or expertise in the manufacture and marketing of the products in which they specialize.

classifying respondent's day planners as "diaries" in HTSUS 4820.10.20 is the supposed weight of Customs' precedent: "[T]his office has consistently determined that articles *similar* in design and/or function to [respondent's day planners] are classifiable as diaries" in HTSUS 4820.10.20 (emphasis added). Pet. App. 31a; Pet'r Br. at 35.[15] At the outset, we find a major legal and logical error in Customs' analysis: If respondent's day planners are "*similar* in design and/or function" to articles previously classified as "diaries" in HTSUS 4810.10.20, then they are properly classified in HTSUS 4820.10.40 as articles *similar* to diaries.

Later, Customs states that, in its various rulings, "Customs held that articles *synonymously* referred to as diaries, planners, agendas, organizers, and engagement books, most of which incorporate the same or similar components as [respondent's day planners] . . ." are "diaries.")(emphasis added). Pet. App. at 32a. Customs cites no extrinsic evidence that these product descriptions are synonymous in the marketplace or in common usage. On the contrary, according to the authoritative lexicographic resource on synonyms, *Roget's International*

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[15] In fact, Customs' position on this classification issue has not been consistent and uniform. As Customs itself explained in HQ 958130, Sept. 12, 1995, a decision issued to Filofax:

> Following the enactment of the HTSUS in 1989, the Area Director of Customs, New York Seaport, issued a number of ruling letters in which merchandise described as organizers, planners, agendas or engagement calendars were not regarded as diaries. At that time, the provision for diaries was reserved for books used as personal journals and suitable for extensive notations or narratives. As the submitted sample was not suitable for these purposes, it was classified as an article similar to a diary.
>
> However, these early decisions were superseded by a series of rulings from Customs Headquarters. . . . .

Thesaurus 394-95 (5th ed. 1992), under the general category "**549 RECORD**" and subcategory "11 <record books>," "**calendar**, desk calendar, appointment calendar, appointment schedule, engagement book, agenda" are synonyms, and "**diary**, journal" are synonyms -- but the **calendar** synonyms and **diary** synonyms are not synonymous with each other.

2. The crux of HQ 955937 is Customs' exclusive reliance upon the second definition of "diary" from *The Compact Edition of the Oxford English Dictionary* 321 (1987),[16] which reads in full as follows:[17]

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[16] The *Compact Oxford* is the full *Oxford English Dictionary*, greatly reduced in size to fit into two volumes; normally it must be read with the aid of a magnifying glass. The identical definition of "diary" is found in V OXFORD ENGLISH DICTIONARY 612 (2d ed. 1989). *Oxford English Dictionary* citations in the remainder of this brief are to the full-size version.

[17] The first definition of "diary" in the *Oxford English Dictionary* reads:

> **1.** A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation.

In HQ 955937, Customs "note[d] that the narrower definition of 'diary,' as set forth in the Oxford English Dictionary's first definition, connotes an article containing blank pages used to record extensive notations of one's daily activities". Pet. App. 33a. The court of appeals also cited to this definition, and to the first "diary" definitions in two other dictionaries, *i.e.*, *The American Heritage Dictionary of the English Language* 516 (3d ed. 1992) ("**1.** A daily record, especially a personal record of events, experiences, and observations, a journal"), and *Webster's New Twentieth Century Dictionary of the English Language* 504 (2d ed. 1961) ("**1.** A daily record, especially of the writer's own experiences, thoughts, etc."). Pet. App. 12a. In Filofax's view, the first "diary" definition in the *Oxford English Dictionary*, and the "diary" definitions cited by the court of appeals, apply to "diaries" in HTSUS 4820.10.20 only indirectly because they connote a written work rather than a blank book.

> **2.** A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also applied to calendars containing daily memoranda on matters of importance to people generally to members of a particular profession, occupation, or pursuit.
>
> A *diary* in this sense may vary in size from a folio volume, large enough to hold a detailed daily record in sense 1, to a small pocket-book with daily spaces only for the briefest notes, or merely with printed memoranda for daily reference.

On its face, this definition does not speak of a "diary" as being used for noting future engagements; it speaks of "daily" memoranda and jottings,[18] and Customs seems to have made a secondary interpretation of "memoranda and jottings" to encompass future appointments.[19] Other *Oxford* dictionaries, however, define "diary" to include a blank, dated book for noting future engagements,[20] while the *Webster's* and *American*

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[18] The "calendar" portion of the definition describes a printed rather than blank article. Customs does not appear to base HQ 955937 upon this facet of the definition.

[19] The modifying adjective "daily" in this context, however, is defined in V *Oxford English Dictionary* 216 as "done every day." The suggests notations of present rather than future events.

[20] *See, e.g.*, 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 669 (4th ed. 1993):

> **1.** A daily record of events, transactions, thoughts, etc., esp. ones involving the writer. **2.** A book in which to keep such a record, usu. having dates printed in it; a book or calendar with daily memoranda, esp. for people with a particular interest; a person's list of forthcoming engagements. . . .

OXFORD AMERICAN DICTIONARY 177 (1980):

Heritage dictionaries do not do so.[21] Even if this difference between the dictionaries could not be resolved or explained, the word "diary" as a tariff term would still have only one possible meaning, *i.e.*, its common meaning, and it would be the responsibility of Customs and the courts to ascertain it. But in this instance, the difference between the dictionaries can be resolved and explained, and the *Webster's/American Heritage* definition clearly is the correct one.

If the common meanings of words are reflected in the everyday language that we read, then common meaning and usage are strongly reflected in the reporting and editorials of the

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1. a daily record of events or thoughts. **2.** a book for this or for noting engagements.

[21] WEBSTER'S NEW WORLD COLLEGE DICTIONARY 399 (4th ed. 2000):

> **1** a daily written record, esp. of the writer's own experiences, thoughts, etc. **2** a book for keeping such a record.

Counsel for Filofax confirmed by telephone on August 13, 2000, with the editors of this dictionary that its third edition, published in 1988, presented the identical definition.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 625 (1993):

> **1 :** a register or record of events, transactions, or observations kept daily or at frequent intervals : JOURNAL, *esp* : a daily record of personal activities, reflections, or feelings **2 :** a book intended or used for a diary

THE AMERICAN HERITAGE DICTIONARY 516 (3d ed. 1992):

> **1.** A daily record, especially a personal record of events, experiences, and observations; a journal. **2.** A book for use in keeping a personal record, as of experiences.

American print news media. The news media invariably establish standards for uniform style and word usage in their publications. Filofax's research has ascertained that one dictionary -- *Webster's New World College Dictionary* -- is the official authority in word usage for the two major U.S. wire services, a major national financial newspaper, and three of the pre-eminent major U.S. city newspapers.[22] This circumstance alone favors *Webster's* over *Oxford* on general issues of

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[22] LOS ANGELES TIMES STYLE AND USAGE GUIDE 2 (K. Gosnell ed. 1995) ("[T]he Webster's New World Dictionary, Third College Edition, updated 1994 . . . is adopted as The Times primary desk dictionary on the effective date of this book."); THE WASHINGTON POST DESKBOOK ON STYLE 219 (2d ed., T. Lippman ed. 1989) ("The Washington Post's authority on matters of spelling, punctuation and definition is Webster's New World Dictionary of American English (Third Edition), published in 1988."); THE NEW YORK TIMES MANUAL OF STYLE AND USAGE ix (A. Siegal & W. Connolly ed. 1999) ("The authority for spelling any word not found here, and for the word's usage, is the most recent printing of Webster's New World College Dictionary (Macmillan)."); THE ASSOCIATED PRESS STYLEBOOK AND BRIEFING ON MEDIA LAW 73 (N. Goldstein ed. 2000) ("**dictionaries** For spelling, style and usage questions not covered by this stylebook, consult Webster's New World College Dictionary, Fourth Edition, published by IDG Books. . . . . [T]he backup dictionary, with more listings, is Webster's Third New International Dictionary, published by G. & C. Merriam Co. of Springfield, Mass."); UPI STYLEBOOK 84 (3d ed. 1995) ("**dictionaries** For spelling, style and usage questions not covered by this stylebook, consult Webster's New World Dictionary of American English, Third College Edition. . . . . For spelling and usage not covered in this book or in Webster's New World Dictionary, consult Webster's Third International Dictionary, which has more entries."); THE WALL STREET JOURNAL STYLEBOOK 56 (4th ed. 1995) ("**dictionaries** For spelling, style and usage questions not covered by this stylebook, consult Webster's New World Dictionary, Third College Edition.).

Webster's New World College Dictionary is among the lexicographic authorities used by Customs in tariff classification decisions. *See, e.g.*, HQ 961942, Oct. 26, 1999; HQ 961004, May 5, 1999.

common meaning.[23]

On the particular issue of "diary," the difference between the *Webster's* and *Oxford* definitions as regards the notation of appointments does not require us to chose one over the other. Both definitions reflect the common meaning of the word "diary" as a blank book -- *Webster's*, in the United States, and *Oxford*, in Great Britain.[24] That is why Filofax, which still

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[23] In no way does Filofax suggest that *Webster's New World College Dictionary* should be anointed the sole authority on word definitions and usage. As Dr. Samuel Johnson observed, "Dictionaries are like watches, the worst is better than none, and the best cannot be expected to go quite true." 1 J. BOSWELL, THE LIFE OF SAMUEL JOHNSON 293 n.3 (L.F. Powell, ed. 1964).

Nor does Filofax suggest that the *Oxford English Dictionary* is disqualified from use in customs classification matters on account of its British origin. We do suggest, however, that when the *Oxford* dictionary presents a definition of a tariff term at odds with the *Webster's* definition, the possibility of a British-American usage difference must be considered.

[24] Filofax commissioned Dr. Bas Aarts, Director of the Survey of English Usage, University College London, to prepare a report on the differences in meaning of the word "diary" in British and American English. Dr. Aarts concluded:

> British and American English differ markedly in their use of the word *diary*. In BrE this word can mean either a book in which personal events and feelings are recorded, as well as a small booklet in which appointments and future engagements are noted down. AmE uses only the first sense of the word *diary*, and uses *agenda* instead for the second sense. Dictionaries of English (both BrE and AmE) have long recorded this difference of usage. Evidence from several large corpora of British and American English conform these findings.

The text of Dr. Aarts's report has been reformatted and attached as an Appendix to this brief; the above-quoted conclusion is to be found on page 9a. The original, hard-copy of Dr. Aarts' report is available for the Court's inspection upon request.

designs its organizers in Great Britain for world-wide distribution, labels their engagement calendar section a "diary."[25]

For the common meaning of tariff terms, Customs and the courts must look to American usage. *See Two Hundred Chests of Tea*, 9 Wheat. 430, 438 (1824) ("Whether a particular article were designated by one name or another, in the country of its origin . . . was of no importance in the view of the legislature. . . . . It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic."); *Norman G. Jensen, Inc. v. United States*, 84 Cust. Ct. 76, 80-81, 490 F. Supp. 497 (1980):

> [I]t is well recognized that in including an article in the tariff schedules, the Congress is deemed to have used the name of such an article in the commercial sense, which, in the absence of evidence to the contrary, shares the same meaning as the common ordinary usage thereof. . . . .The term "postage stamps," . . . throughout the years has been used in the ordinary course of communication and commerce between peoples of this world. If a distinction might exist between a philatelic meaning of the term

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See also BRITSPEAK'S BRITISH-AMERICAN DICTIONARY, http://pages.prodigy.com/NY/NYC/britspeak/ukus2.html (British Word - "Diary"; American Say - "Appointment book.").

[25] The product in *Brooks Bros. v. United States*, 68 Cust. Ct. 91 (1972) was "The Economist Diary -- 1966". The Customs Court opined: "The description or label of "diary" has been properly chosen by those who have brought the article into being and have offered it for sale". 68 Cust. Ct. at 96. *The Economist* is a famous British current-affairs periodical with world-wide circulation; its thematic engagement calendar is denoted a "diary" in accordance with British usage.

> "postage stamps" and general common meaning thereof as used in the nonphilatelic world, it is improbable that the Congress intended the term to have a meaning other than the connotation commonly accepted in the everyday social and business communities of our country.

Standard Oil Co. of New Jersey v. United States, 5 Cust. Ct. 166, 167 (1940) ("We are satisfied that the latter definition represents the common meaning of the term in ordinary usage in the United States.").[26]

Under the American usage principle, the *Webster's* definition of "diary" should apply under HTSUS 4820.10.20; Customs knowingly violated this principle in HQ 955937 by selecting the *Oxford* definition. This is not mere speculation: A year and a half earlier, in HQ 953413, Mar. 29, 1993, Customs explained to another importer that it selected the broader *Oxford* definition of "dairy" because the narrower *Webster's* definition

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[26] *Cf. also National Coalition for Students with Disabilities Education And Legal Defense Fund v. Gilmore*, 152 F.3d 283, 289-90 (1998), *as amended*, 190 F.3d 600 (4th Cir. 1999):

> In fact, the only support for Virginia's argument comes not from American but from British usage of the term "office." . . . Were we interpreting a statute of British origin, this definition might be sufficient to create an ambiguity of meaning. [¶] In this case, however, we are interpreting a statute enacted by the United States Congress, with the constituent states of the Union as the intended audience. The fact that an alternative definition exists in the English language is not enough to create ambiguity. . . . We believe that when the alternative definition of a term derives chiefly from usage outside the United States, the foreign usage will not blur an otherwise plain meaning of the term in one of our statutes, unless there is clear evidence that Congress intended to adopt the foreign definition.

> would place a narrow construction on the interpretation of the nomenclature at the international level. . . . It is indisputable that the [*Oxford English Dictionary*] is recognized internationally as a valid source of reference and that it therefore provides an acceptable definition of the term "diary" for purposes of interpreting the scope of the word as it is used in the Harmonized System.

The Harmonized System nomenclature is the initial six-digit portion of HTSUS provisions that has been adopted at the international level.

To make matters more outrageous, it seems that Customs has no problem recalling and applying the American usage principle when articles other than day planners are involved. In HQ 954022, Aug. 8, 1994, and HQ 952530, June 9, 1994, Customs considered the tariff classification of a long-sleeved T-shirt. Customs found that, under the Harmonized System at the international level, a T-shirt may be either long-sleeved or short-sleeved, but , "[a]s illustrated by numerous dictionaries, the term 'T-shirt' in the United States adheres to a narrower and more specific definition which precludes the long-sleeved version of the same garment." Customs resolved the matter as follows:

> The classification of articles under the HTSUSA is based on a ten digit system. The first four digits of the classification identify each heading and at the six digit level, the subheading is also identified. This six digit level represents the international system of classification. Anything after the six digit level, i.e., the remaining four digits, are used by each country for domestic tariff and statistical subdivisions. . . .
>
> Though the description of "T-shirt" in the . . . EN is inclusive of long close-fitting sleeves, this type of

> long-sleeved garment is commonly recognized as a "T-shirt" in the international community more than in the U.S. market. Accordingly, the classification of this type of garment is modified at the ten digit level to meet the domestic commercial reality. That is to say, this long-sleeved garment with traditional "T-shirt" features is classified as being similar to the traditional short-sleeved "T-shirt" recognized in the U.S.

When considering long-sleeved T-shirts, Customs correctly recognized that classification at the national tariff rate and statistical level (in this instance, for apparel quota purposes) must reflect the common American meaning of a tariff term, notwithstanding a broader meaning of the term at the international level. When considering respondent's day planners and Filofax's organizers, however, Customs eschewed the narrower, American meaning of "diary" reflected in *Webster's* in favor of the broader, international meaning reflected in *Oxford*. This sort of unprincipled agency decisionmaking is unworthy of respect, much less deference.

In sum, based upon the correct and lawful lexicographic authority, *Webster's*, respondent's day planners are the same as diaries in that they are blank books with dated pages, but they differ from diaries in that they are designed and used to note future events, *etc.* rather than to record present events, *etc.* Accordingly, they are "similar" to diaries and are properly classified in HTSUS 4810.10.40. The court of appeals' decision to this effect is correct, and Customs' determination to the contrary in HQ 955937 is erroneous.

3. Filofax believes that the court of appeal was correct in its finding that the Customs Court and Court of International Trade decisions which speak to the issue of diaries under the pre-1989 Tariff Schedules of the United States ("TSUS"), *viz.*, *Fred Baumgarten v. United States*, 49 Cust. Ct. 275 (1962),

Brooks Bros. v. United States, 68 Cust Ct. 91 (1972), and *Charles Scribner's Sons, Inc. v. United States*, 574 F. Supp. 1058 (Ct. Int'l Trade 1983), "supply only limited guidance for this case."[27] Pet. App. 8a-11a.

III. CUSTOMS' DETERMINATION THAT DIARIES IN LOOSE-LEAF RING BINDERS ARE "BOUND" UNDER HTSUS 4820.10.20 IS AN UNLAWFUL, "BACKWARDS" EXERCISE IN TARIFF CLASSIFICATION, REFLECTS AN IMPERMISSIBLE INTERPRETATION OF THE TERM "BOUND," IS ERRONEOUS EVEN UNDER THAT INTERPRETATION, AND IS OTHERWISE INSUPPORTABLE

Turning to the issue of whether respondent's day planners are "bound" under HTSUS 4820.10.20, the court of appeals first determined that, in the context of books, the common meaning of "bound" is "permanently secured or fastened." Then, applying this meaning to the undisputed facts, the court of appeals found that respondent's day planners which utilize a loose-leaf ring binder are not "bound" under HTSUS 4820.10.20. Pet. App. 14a-16a. Petitioner asserts that Customs' contrary determination in HQ 955937 is a "thorough, well-formulated, [and] reasonable interpretation of the Tariff Act," to which the court of appeals should have accorded *Chevron* deference. Pet'r Br. at 35-37. It is nothing of the kind.

As mentioned above, *Chevron* deference generally is accorded permissible agency interpretations of ambiguous or vague terms in the statutes which they administer. Customs' determination that diaries in loose-leaf ring binders are "bound"

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[27] Eighteen years ago, counsel for Filofax on this brief served as counsel for Charles Scribner's Sons in that litigation.

under HTSUS 4820.10.20 is not an "interpretation" *per se* of the HTSUS. Rather, it is -- or is supposed to be -- a conclusion reached by ascertaining the common and commercial meaning of "bound" in HTSUS 4820.10.20, then applying that meaning to the features and functions of a loose-leaf ring binder.[28] In HQ 955937, however, Customs ran the tariff classification process backwards -- first, concluding that loose-leaf ring binders make "bound" diaries under HTSUS 4820.10.20, then, "[l]astly," employing "a semantical approach to the issue" in order to synthesize a compatible definition of "bound," *i.e.*, "held together in a fixed order". Pet. App. 46a. This is not "thorough, well-formulated [or] reasonable" agency decision-making (Pet'r Br. at 36) by any standard. As a matter of tariff classification procedure, it is unlawful.

Putting all this aside, Customs' stated grounds in HQ 955937 for determining that loose-leaf ring binders make "bound" diaries in HTSUS 4820.10.20 (addressed below *seriatim*) are patently unreasonable. More important, Customs' semantically-derived meaning of "bound" is impermissible in the statutory context and actually does not support Customs' determination.

1. Customs finessed respondent's on-point Customs Court precedent[29] and lexicographic authorities on the common and commercial meaning of "bound" in the context of books,

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[28] "Classification of goods entails a two-step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise in question comes within the description of the properly construed terms." *Hewlett-Packard Co. v. United States*, 189 F.3d 1346, 1348 (Fed. Cir. 1999), *citing Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994).

[29] *Kessler & Co. v. United States*, 63 Cust. Ct. 513, C.D. 3944 (1969), *citing Overton & Co. v. United States*, 22 Treas. Dec. 437, T.D. 32,327 (1912).

framing "the issue at hand" in terms of what is a "bound diary," and positing, *ipse dixit*, that "there is no requirement that a diary be in the format of a book". Pet. App. 44a, Pet'r. Br. 35-36.[30] That very requirement, however, is reflected in the *Oxford English Dictionary* definition of "diary" which Customs embraced in the decision ("A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings."). Pet. App. 33a.[31] Moreover, respondent's day planners, even if they be "diaries," *are* in the format of a book, and so the determination whether they are "bound" cannot be divorced from that context.

2. Customs grounded its determination that loose-leaf ring binders make a "bound" diary mainly on the Harmonized Commodity Description and Coding System Explanatory Notes ("EN") to Heading 4820, p. 687, "which represent the official interpretation of the HTS at the international level" (*see* Pet'r Br. at 36 n.24), and which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics

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[30] Petitioner's complaint that "the court of appeals declined to consider industry usage" in determining the meaning of "bound" (Pet'r Br. at 37 n.25) is odd in light of Customs' insistence in HQ 955937 that the book trade's views on the matter are irrelevant. Pet. App. 44a. In any event, petitioner's complaint is unfounded; the court of appeals relied primarily upon a specialized trade dictionary, THE DICTIONARY OF PUBLISHING 43-44 (1982), for its view of "bound.". Pet. App. 15a.

[31] The second *Oxford English Dictionary* definition of "diary" further mentions "calendars containing daily memoranda on matters of importance to people generally or to members of a particular profession, occupation, or pursuit". Customs appears not to have made any use of this additional definition in HQ 955937, and petitioner's brief does not mention it. *See* Pet'r Br. at 8.

The definition of a blank "diary" in *Webster's New World College Dictionary* requires that it be a book. *See* p. 16 n.21 *supra*.

or textile material) and have reinforcements or fittings of metal, plastics, etc." Pet. App. at 45a. Customs read this provision as making it "clear that the Harmonized System Committee contemplated metal binders as being within this heading's definition of bound articles. . . . In this case, the EN specifically set forth how articles of heading 4820, HTSUSA, may be bound. The EN state that articles of this heading may be bound with metal." *Ibid.*

The EN to Heading 4820 has no definitive statement, or even implication, that loose-leaf ring binders make "bound" books. The materials with which goods of Heading 4820 may be "bound" are those that usually would appear in their exterior covers (paper and leather seem ill-suited for physically connecting sheets of paper). The EN's specification that an article of Heading 4820 may have reinforcements or fittings of metal, *e.g.*, a loose-leaf ring mechanism, or a spring-loaded compression mechanism, inside a paperboard binder cover, does not suggest that putting paper sheets inside such a binder creates a "bound" book. The manifest purpose of this paragraph of the EN to Heading 4820 is not specify the meaning of "bound" -- a pointless exercise, since that term does not appear in Heading 4820 -- but to make clear that stationary articles of paper or paperboard remain classified in Heading 4820 even if they incorporate other materials.

3. Next, Customs looked to *Brooks Bros.*, in which a spiral-bound "Economist Diary" was classified as a bound diary under item 256.56, Tariff Schedules of the United States ("TSUS"), in effect before 1989, as precedent that all diaries with ring binders or spiral binding are "bound" under HTSUS 4820.10.20. Pet. App. 45a. *Brooks Bros.* is not decisional precedent even that spiral bindings make "bound" diaries because no such decision was made; the plaintiff "[did] not dispute that the merchandise . . . consists of bound books". 68 Cust. Ct. at 93-94. Moreover, Filofax understands that none of

respondent's day planners have spiral bindings (and neither do Filofax organizers). Finally, it is illogical to propose that: (a) spiral bindings make "bound" diaries; (b) spiral bindings and ring binders can be made of metal; and therefore (c) ring binders make "bound" diaries.

4. Customs further suggested that, if diaries in ring binders and with spiral binding are not deemed "bound," then there would have been no TSUS provision under which to classify them because all blank books -- whether specifically diaries, notebooks and address books in item 256.56, TSUS, or non-specified "other" blank books under item 256.58, TSUS -- were subject to a superior heading which required that they be "bound". Pet. App. 46a. This is not so; an unbound blank book would always find classification under item 256.90, TSUS, the ultimate basket provision for "articles . . . of paper . . . not specially provided for."

In any event, obviating an anomaly under obsolete law is hardly good reason for creating an anomaly under current law. Customs' semantical interpretation of "bound", diaries, notebooks and address books creates such an anomaly. Under superior heading HTSUS 4820.10, all diaries must find classification in either HTSUS 4820.10.20, if "bound", or in HTSUS 4820.10.40, if not bound. Assuming Customs' view that "bound" diaries in HTSUS 4820.10.20 merely have their pages "held together" (Pet. App. 46a), it follows that unbound diaries, which *must* be classified in HTSUS 4820.10.40, have pages that are not "held together." This necessary classification treatment is precluded, however, by HTSUS Ch. 48, Note 9, which provides: "Heading 4820 does not cover loose sheets or cards, cut to size, whether or not printed, embossed or

perforated."[32]

Accordingly, in order to enforce Note 9 without nullifying HTSUS 4820.10 vis-a-vis unbound diaries, the term "bound" cannot mean merely "held together."[33] The court of appeals was correct that Customs' broad interpretation of "bound" in HTSUS 4820.10.20 is impermissible, though it reached that conclusion by a different route. Pet. App. 15a-16a. This circumstance alone precludes *Chevron* mandatory deference, *Skidmore* persuasive deference,[34] or any degree of acceptance.

5. Finally, Customs took "a semantical approach to this issue," positing that "a binder . . . is that which binds pages together in a fixed order. Pages held together in this manner are bound . . ." Pet. App. 46a.

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[32] At oral argument before the court of appeals, petitioner "argued that a stack of loose-leaf pages could constitute an unbound diary" classifiable in HTSUS 4820.10.40. Pet. App. 15a. That is not Customs' position, however. Filofax imports a wide variety of such "unbound" blank books in the form of packaged inserts for Filofax organizers; these include "diaries" (engagement calendars), notebooks, name/address/telephone books, expense ledgers, etc. In HQ 955516, Apr. 8, 1994, in accordance with HTSUS Ch. 48, Note 9, Customs held that Filofax's packaged organizer inserts are classifiable in HTSUS 4823.51.00, which provides for "other paper, paperboard, cellulose wadding...: other paper and paperboard, of a kind used for writing, printing or other graphic purposes: printed, embossed or perforated..."

[33] In several rulings issued in 1992, Customs held that bound diaries with paperboard backings, designed to be inserted into interior slots or pockets of outer covers (like the pocket part of a law book) are unbound diaries classifiable in HTSUS 4820.10.40. In HQ 953413, Mar. 29, 1993, Customs recognized the error of its ways and reclassified such articles in HTSUS 4820.10.20. The aberrant 1992 rulings were formally modified or revoked in October 1997. *See, e.g.*, HQ 960764, Oct. 7, 1997, *revoking* HQ 950984, Jan. 27, 1992.

[34] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In all frankness, Customs should consult a good dictionary before dabbling in semantics. *Webster's New World College Dictionary*, the official dictionary for most of America's print news media (*see* text at note 22 *supra*), presents the following relevant definitions:

binder. . . **2** a thing that binds or holds together; specif., . . . *c)* a detachable cover with rings or clamps for holding sheets of paper together. (page 145)

bind . . . **8** to fasten together the printed pages of (a book) and enclose them within a protective cover. (page 145)

bound . . . **6** provided with a binding or attached cover, as a book. (page 172)

binding . . .**2** a thing that binds, as . . . *d)* the covers and backing of a book. (page 145)

Inserting pages into a "binder" merely holds them together in a *changeable*, not fixed, order; "binding" pages to make a "bound" book entails fastening them together in a fixed order. The former connotes a temporary or changeable condition; the latter connotes permanency.

The pages of respondent's loose-leaf day planners, like those of Filofax loose-leaf organizers, are held together in a changeable order; they can be supplemented, removed and reinserted, or rearranged, all according to the user's desires and needs. They are not fastened together, or even held together, in a fixed order, and so they are not a "bound" book.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

CHARLES H. BAYAR, ESQ.
Counsel of Record
P.O. Box 4527, Grand Central Station
New York, New York 10163
(212) 867-0025

Counsel for Amicus Curiae Filofax Inc.

APPENDIX

APPENDIX A

REPORT

On the differences in meaning of the word *diary* in British and American English

by

Bas Aarts PhD

Director
The Survey of English Usage
University College London
Gower Street
London WC1E 6BT
England
b.aarts@ucl.ac.uk
Telephone: 020 7679 3130 (work)
020 7722 2362 (home)

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Introduction: American English and British English

It is generally known that American English (AmE) and British English (BrE) differ in a number of ways. A minority of these differences are grammatical in nature. Thus, for example, AmE has two past participles of the verb *get* (*got* and *gotten*), whereas BrE only has one (*got*). British English collective nouns agree with both singular and plural verbs, e.g.

The government is/are *in favour of economic sanctions.*

In AmE only the singular verb agreement is acceptable.

The Past Simple Tense in American English has a wider usage than in BrE. For example *Sue just finished her homework* is an acceptable sentence in AmE, but British speakers would prefer the Present Perfect Tense in this context (*She has just finished her homework*).[1]

While these differences are important, the differences in the lexical domain are much more numerous and more subtle. The two languages can express the same concept with different words, e.g. *underground* in BrE is *subway* in AmE, *tin* in BrE is *can* in AmE, *petrol* in BrE is *gas(oline)* in AmE. The same word can mean different things in the two languages. E.g. *public school* in AmE is a school maintained by public funds, whereas in BrE the same word refers to fee paying schools. *Pavement* in BrE is the surface next to the road which

[1] Examples from Randolph Quirk, Sidney Greenbaum, Geoffrey Leech and Jan Svartvik *A Comprehensive Grammar of the English Language* (London: Longman, 1985).

pedestrians walk on. The same word in AmE refers to the surface of the road itself. Some words are more widely used in one variety, while being more restricted in the other variety. E.g. *shop* in AmE is used only to designate a small and specialised store, or a high-class establishment.

We turn now to the specific word *diary* in the two varieties of English.

The lexical item *diary* in British English and American English

The *Oxford English Dictionary* (OED) gives two principal meanings for the word *diary*:

- A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observations.
- A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also, applied to calendars containing daily memoranda on matters of importance to people generally, or to members of a particular profession, occupation, or pursuit.

Both meanings have long been established in BrE usage: the first sense was first attested in 1581, the second in 1605.

Although the two meanings are related, the main difference between the two uses of *diary* seems to be the extent to which the diary is meant to be a private document. Thus, in its first meaning the word means a document for private use, where people record past events. The second meaning seems to be more a document used to write down plans for future events. It is less private, and can even belong to a group of people.

The two different usages first recorded by the OED in the late 16th century are preserved in contemporary BrE. The

British *Cobuild Dictionary* confirms the existence of two meanings:

- If you keep a diary, you regularly write down your experiences, thoughts and feelings in a diary. EG *I haven't kept a diary since I was at school.*
- A diary is a book which has a separate space or page for each day of the year. You use a diary to write down your appointments and things you have to do in the future, or to record what happens in you life day by day. EG *He got out his diary and made a note in it.* [2]

American English differs from British English in allowing the word *diary* to be used only in its more restrictive sense to denote a private document, where the author records personal activities, reflections, or feelings. This is the only meaning recorded by Webster's Third Dictionary:

- A register or record of events, transactions, or observations kept daily or at frequent intervals: Journal; esp.: a daily record of personal activities, reflections or feelings; a book intended or used for a diary.

The lexical item *diary* in the Survey of English Usage corpora (BrE) and in the Brown Corpus (AmE)

Dictionaries are mostly based on the knowledge and intuitions of lexicographers. Ever since the emergence of language corpora these intuitions can be tested, and more reliable statements about usage can be made. What are corpora? Corpora are large collections of spoken and written material from particular languages used in linguistic

[2] Examples from the *Cobuild Dictionary* are taken from an extensive corpus of modern BrE.

research by speech technologists and dictionary compilers, amongst others. They are invaluable databases for those who want access to *real* language data to study particular grammatical or lexical issues. This report makes use of the two corpora housed in the Survey of English Usage (SEU) at University College London (UCL), as well of the Brown Corpus of American English. For more information about the SEU, see the last section of this report.

The AmE usage of the word diary with the sense 'private record of activities' is illustrated by the following examples from the Brown Corpus:

- Dr. L. Taylor of Manchester Depot recorded the setting of phone poles in East Dorset and Barnumville in his **diary** for 1906.
- Private Jenkins Lloyd Jones of the Wisconsin Light Artillery wrote in his **diary**: "I strolled among the Alabamans on the right..."
- "That Man in the White House, like some despot of yore, insisted on reading my **diary**, raiding my larder and ransacking my lingerie!"

This meaning is also attested in the corpora at the Survey of English Usage. Here are some examples:

ICE-GB:W2B-010 #45:1[3]
In this form it was said to the architectural historian James Lees-Milne and recorded by him in his **diary** on 6 June 1945.

ICE-GB:W2B-010 #264:1
As for Churchill - well , John Colville, his private secretary, seems to quote a French source in his **diary** for 13 June

[3] The code is the text identifier.

1940 ("some gleam of light at the far end of the tunnel"), and quotes Paul Reynaud , the French PM on 16 June ("the ray of light at the end of the tunnel"), and himself uses it on 31 May 1952, "I think it is more that he [Churchill] cannot see the light at the end of the tunnel".

However, as we have seen, in BrE *diary* can be used to mean 'planner'. Examples from the SEU corpora follow:

S-07-02[4]
<#326> <$B> Yes, hello here we are.
<#327> <$A> Have... did you hear me?
<#328> <$B> Yes, no I didn't. <laughs>
<#329> <$A> It is… did you know that we're going to May Hammond?
<#330> <$B> Yes, I did .
<#331> <$A> You did?
<#332> <$B> Yes.
<#333> <$A> I 'd completely forgotten forgotten.
<#334> <$B> I had it in my **diary.** <laughs>
<#335> <$A> Oh, so did I. <laughs> I didn't look at it. <laughs>
<#336> <$B> I was just thinking what a good thing it is I've got my **diary.** <laughs>
<#337> <$A> <laughs> Well, that's all right then. I'll see you at home.

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[4] Key: 'S-07-02' is the text identifier; '#326' indicates the line number within the text; '<$A, B>' identifies the speakers. All examples in this report are instances of authentic English usage. In the case of spoken English the extracts have been faithfully transcribed, and thus include hesitations, repetitions and other disfluencies characteristic of real speech.

S-09-01
<#283> <$B> I am I am back in London. I'm here, yes, ehm and…
<#284> <$A> Oh, you are? Well, would you like to make a date for lunch?
<#285> <$B> That would be very nice, yes.
<#286> <$A> Got your **diary**?
<#287> <$B> Ehm, no but I can remember most things.
<#288> <$A> Right, looking forward about a month, ehm, how are you placed in the week beginning eh March the third?
<#289> <$B> As far as I know that's all right. Ehm, I teach seminars beginning at two on a Tuesday.
<#290> <$A> Mmm.
<#291> <$B> Now, wait a moment. Is there another one? Some weeks I teach one beginning at... Actually it begins at three on a Thursday, so that's not too bad.
<#292> <$A> What about a Wednesday? Is that good for you?
<#293> <$B> Wednesday is quite a good day, because I don't teach at all on it

S-08-02
<#529> <$B> It's me again, doctor Edgton. I was just going to say, ehm, would it be all right for me to come a little bit earlier tomorrow? I've arranged in fact to have lunch with a friend of mine who lives in Barn Bell and bring her along with me if that's all right.
<#530> <$C> Oh, that's useful isn't it?
<#531> <$B> Yes.
<#532> <$C> Ehm, yes let me just have a little look at my **diary**.
<#533> <$B> OK.
<#534> <$C> Tomorrow is Wednesday Wednesday.
<#535> <$B> Wednesday, Wednesday, yeah.

<#536> <$C> Let me have a little look see. Wednesday… what time do you have in mind?
<#537> <$B> Well, I would have thought between half past two and three.
<#538> <$C> That would be fine.

S-03-07
<#577> <$B> There's still time to plan round that.
<#578> <$A> Mhm.
<#579> <$B> With any luck, what is it, twenty-seven twenty-seventh of July, is it?, they're away.
<#580> <$c> Twenty-eighth they're going, yeah.
<#581> <$B> Twenty-eighth.
<#582> <$c> But we'll be out, ehm, the week of the twentieth as well. You can go and stay elsewhere and I and the kids are going to be out.
<#583> <$B> Let me just check the **diary**. Yes, <laughs> Jen actually sent you this letter only she hadn't quite mastered the word processor and…
<#584> <$A> <laughs>
<#585> <$B> <laughs>
<#586> <$A> Well, she actually was able to program the word processor to to say that she hadn't mastered it as far as I remember.

All these examples very clearly illustrate the British English usage of *diary* in the sense of 'planner'.

British English also makes use of the idiomatic expression 'get one's diary out'. A teacher might say this to her students at the end of a class to arrange a time for the next class. Naturally, this sense is confined to the meaning of the word *diary* meaning 'planner'.

Conclusion

British and American English differ markedly in their use of the word *diary*. In BrE this word can mean either a book in which personal events and feelings are recorded, as well as a small booklet in which appointments and future engagements are noted down. AmE uses only the first sense of the word *diary*, and uses *agenda* instead for the second sense. Dictionaries of English (both BrE and AmE) have long recorded this difference of usage. Evidence from several large corpora of British and American English confirms these findings.

About the Survey of English Usage

The Survey of English Usage (SEU) is an English Language research centre established by Professor the Lord Randolph Quirk in 1959. It is an internationally recognised and highly regarded centre of excellence for research in the area of English Language and Linguistics. It is housed in the Department of English Language and Literature at University College London (UCL), one of only two departments in the UK to be awarded top research ratings. Along with Oxford it was judged the best English Department in the UK in the *Times Good Universities Guide*. The SEU is especially well known for its work on contemporary grammar: the authors of the standard grammar of the English Language (*The Comprehensive Grammar of the English Language*, 1985, by Randolph Quirk, Sidney Greenbaum, Geoffrey Leech and Jan Svartvik) all have links with the Survey, and two are former directors. The Survey is also known for its pioneering work in the area of corpus linguistics. A great number of linguists have carried out research there, and have based their publications on material derived from the two language corpora produced at the SEU: the *Survey of English Usage Corpus* and the *International Corpus of English*. Also based at the Survey is the Cambridge University Press journal *English Language and Linguistics*. Distinguished previous

Directors are Professor The Lord Quirk and the late Professor Sidney Greenbaum. Dr. Bas Aarts is the current Director.

Over the years the Survey has been involved in pure research into the structure and usage of the English Language. The SEU has a proven track record in attracting external funding and in project management. A number of these projects were funded by the Higher Education Funding Councils, others by private organisations. We list the most important funding bodies below:

- The Economic and Social Research Council
- The Economic and Physical Sciences Research Council
- The Joints Informations Systems Committee
- The Leverhulme Trust
- The Sasakawa Foundation
- The Arts and Humanities Research Board
- The British Academy

The British component of the *International Corpus of English* (ICE-GB) mentioned above is a one-million word corpus which has been fully grammatically tagged and parsed. To search the corpus the SEU has constructed sophisticated and innovative software, the *ICE Corpus Utility Programme* (ICECUP). ICE-GB is rapidly becoming one of the standard resources for research into the English language. For more details, see the ICE-GB website at http://www.ucl.ac.uk/english-usage/ice-gb/index.htm.

For more information on the Survey of English Usage in general, including past projects, please visit our website at http://www/ucl.ac.uk/english-usage.

Bas Aarts PhD
University College London
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